

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

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77-6103

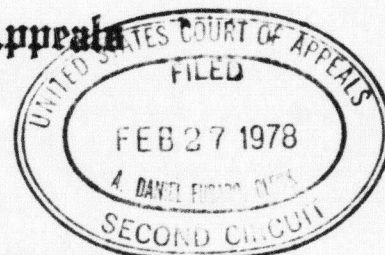
To be Argued by:
JAMES NESPOLE

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United States Court of Appeals

For the Second Circuit

Docket No. 77-6103



RAY MARSHALL, Secretary of Labor, U.S. Dept. of Labor,
Plaintiff-Appellee,
v.
NORTHWEST ORIENT AIRLINES, INC.,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

**REPLY BRIEF ON BEHALF OF DEFENDANT-
APPELLANT NORTHWEST AIRLINES, INC.**

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----x
RAY MARSHALL, Secretary of Labor,
U.S. Dept. of Labor,

: Docket No. 77-6103

:
Plaintiff-Appellee,

:
-against-
:

:
NORTHWEST ORIENT AIRLINES, INC.,

:
Defendant-Appellant.
-----x

Preliminary Statement

This brief is submitted on behalf of Northwest
in reply to the brief for the Secretary.

ARGUMENT

The District Court Must Determine
The Secretary's Authority to Search
Areas Clearly Regulated by Other
Federal Agencies

The Secretary's reliance upon the cases which hold that an administrative agency must determine the extent of its jurisdiction to regulate a particular enterprise does not meet the issue. The federal agencies in the cases of Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41 (1938), Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186 (1946), Matter of Restland Memorial Park, 540 F.2d 626 (3d Cir. 1976), and Marshall v. Able Contractors Inc., No. 76-1615 (9th Cir. January 10, 1978), were not confronted with a situation where the conditions which were the subject of their jurisdictional inquiry were regulated by another federal agency.

The exemption question is not whether, as in Myers, Oklahoma Press, Restland Memorial Park, and Marshall v. Able Contractor's, Inc., a particular business is subject to federal regulation, but rather whether that business is exempt from regulation by one federal agency because it is already regulated by another. The determination of that issue should be left to the District Court.

Section 4(b)(1) of the Act provides:

"Nothing in this chapter shall apply to working conditions of employees with respect to which other Federal agencies . . . exercise statutory authority to prescribe or enforce standards affecting occupational safety and health." (Emphasis supplied.)

The clear language of the statute indicates Congress' intent to prohibit OSHA from creating confusion in the regulation of working conditions of employees where another agency possesses the authority to regulate those conditions and is exercising that authority. The Secretary's contention that OSHA is the exclusive forum for the initial determination of jurisdiction respecting the safe working conditions of Northwest's employees should be measured against the Congressional purpose set forth in Section 4(b)(1).*

It is apparent that Congress desired to avoid confusing or inconsistent regulations which may stem from a jurisdictional dispute between two agencies. It is also apparent that the "nook and cranny" concept of

* Indeed, the language of that section raises the question whether Congress intended that the administrative review procedures set forth in the Act would operate at all under facts such as are presented herein, for the Act provides that "Nothing in this chapter shall apply" in the event that other federal agencies are regulating the occupational safety and health of employees.

regulation, in cases of overlapping jurisdiction, would introduce confusion into the FAA's regulatory scheme by imposing different standards and concepts of regulation respecting safe working conditions for the same employees in the same environmental area or location. That result, of course, is contrary to the Congressional intent underlying Section 4(b)(1).

To avoid this possibility of inconsistent regulation in the sensitive area of airline regulation, the District Court should resolve the jurisdictional issue prior to entry by OSHA officials, thereby precluding OSHA inspectors from attempting to make an ad hoc determination of their jurisdiction during an inspection.*

The ill-advised result which may stem from requiring OSHA to determine its own jurisdiction, to the exclusion

* A determination by the District Court would not impede enforcement of the Act, even if another agency did not preempt the area. In connection with the proceeding before Judge Ditore, Northwest was originally notified on May 21, 1975 that OSHA proposed to assess a penalty against Northwest for a violation of §5(a)(1) of the Act relating to the maintenance operation on the flaps of the Boeing 747 aircraft (A 70). On September 28, 1976 Judge Ditore rendered his decision sustaining Northwest's claim that it was the FAA, and not OSHA, which regulated that working condition. To date, nearly three (3) years after the original citation, and approximately seventeen (17) months after Judge Ditore's decision had been reached, a final determination by the full Commission respecting the Section 4(b)(1) issue has not been reached.

of another federal agency, is underscored by the Commission's proceeding before Judge Ditore. Despite the initiation of the proceeding against Northwest, the Secretary acknowledged, during the course of the proceeding, that the procedure employed by Northwest, which was sanctioned by the FAA,* with respect to changing landing rights on the Boeing 747 airplane was one of two alternative procedures advocated by OSHA to prevent or eliminate any hazard attendant to the task (A 45). This incident clearly illustrates the needless confusion and ill-conceived restrictions to which an airline

* The Secretary's assertion at page 56 of its brief that the manuals prepared by Northwest do not constitute an exercise of the FAA's statutory authority to regulate the safe working conditions of Northwest's employees has been explicitly rejected by the Commission. In Allegheny Airlines, Inc., 6 BNA OSHC 1147, 1148 (OSHRC Oct. 31, 1977), the Commissioner stated:

"The Secretary contended that allowing Allegheny to prepare its own manuals, subject to FAA approval and enforcement does not amount to an 'exercise' of authority under Section 4(b)(1). However, the exemption of Section 4(b)(1) is triggered whenever an agency exercises statutory authority to 'prescribe or enforce standards or regulations affecting occupational safety or health.' While the FAA did not prescribe any standards in the present case, its enforcement of the standards developed by the airline constitutes an exercise of authority within the meaning of Section 4(b)(1)."

(Emphasis in original.)

may be subject by unnecessary regulation which is contrary to the intent of Congress. Northwest should not be compelled to exhaust its purported administrative remedies before OSHA.

Apart from the statutory exclusion under Section 4(b)(1) which renders the Myers and Oklahoma Press Publishing Co. cases inapposite, these cases do not involve a physical intrusion by an agency pursuant to a search warrant. Thus, in Oklahoma Press Publishing Co. v. Walling, where the issue of coverage arose in the context of a proceeding to enforce an administrative subpoena duces tecum, the Court expressly observed that the case presented:

"no question of actual search and seizure but raised[d] only the question whether orders of a court for the production of specified records have been validly made" (327 U.S. at 195).

Indeed, the Court questioned, or at least left open the question, whether the Fourth Amendment was even applicable to subpoenas duces tecum* when it said:

* See United States v. Doe, 457 F.2d 895, 900 (2d Cir. 1972), a case involving a grand jury subpoena, in which Judge Friendly suggested, in dictum, that perhaps the Supreme Court meant that the due process clause was the provision applicable to the production of materials pursuant to such subpoena.

"the Fourth [Amendment], if applicable, at the most guards against abuse only by way of too much indefiniteness or breadth in the things required to be 'particularly described,' if also the inquiry is one the demanding agency is authorized by law to make and the materials specified are relevant." (327 U.S. at 208) (emphasis added).

In short, the Constitutional interests protected and the standards of judicial scrutiny required are less in situations involving the enforcement of administrative subpoenas than in situations where an administrative search* warrant is sought to be issued. In United States v. Miller, 425 U.S. 435 (1976), the Supreme Court held that the

* The very broad search warrant ordered reinstated by the District Court in the instant case would authorize OSHA's inspectors to enter Northwest's place of business at Hangar No. 1 to make an inspection and investigation which

"will extend to the establishment or other area, workplace, or environment where work is performed by employees of these employers, and to all pertinent conditions, structures, machines, apparatus, devices, equipment, materials, and all other things therein (including records, files, papers, processes, controls and facilities) bearing on whether these employers are furnishing to employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to their employees, and whether these employers are complying with the Occupational Safety and Health Standards promulgated under the Act and the rules, regulations and orders issued pursuant to the Act." (A7, 30-31)

The warrant would further authorize the inspectors "to take photographs and samples, employ other reasonable investigative techniques, and to question privately any employer, owner, operator, agent, or employee of the establishment" (A31).

District Court had correctly denied a motion to suppress bank records, maintained pursuant to an act of Congress, which a bank had turned over without consulting the accused depositor. The Court refused to apply to the challenged grand jury subpoena duces tecum the standard of "greater judicial scrutiny, equivalent to that required for a search warrant", and stressed "the traditional distinction between a search warrant and a subpoena." 425 U.S. at 446. The Court emphasized that, unlike subpoenas and subpoenas duces tecum, "[a] search warrant, in contrast, is issuable only pursuant to prior judicial approval and authorizes Government officers to seize evidence without requiring enforcement through the courts." United States v. Miller, Id., fn. 8, (emphasis added). The "prior judicial approval" required for the issuance of a search warrant necessarily includes scrutiny of the agency's authority to act, particularly where, as here, that authority has been expressly and unequivocally limited by Congress (Section 4(b)(1)), and a definite showing has been made that the limitation applies. The subpoena cases relied upon by the District Court and the Secretary are thus inapposite. See also Thomas v. United States, 376 F.2d 564, 566 (5th Cir. 1967); United States v. Brouillette, 478 F.2d 1171, 1176 (5th Cir. 1973).

The presence in this case of two federal agencies eliminates the policy reasons which might otherwise support application of the doctrine of exhaustion of administrative remedies. Where a single agency is involved, the question of coverage is perhaps appropriately lodged in that agency in the first instance, because the questions posed go only to the extent of its own authority. However, where two federal agencies are involved, the question presented is different because it necessarily involves determination of the extent of the other agency's regulatory authority. OSHA has no particular expertise to decide the scope of the FAA's exercise of statutory authority, or to determine whether Congress, had it considered the question, would have intended that OSHA, rather than the FAA, should regulate working conditions of airline ground maintenance employees. In sum, this is not a proper case in which to compel Northwest to exhaust its purported administrative remedies.*

* Additional cases holding that remedies need not be exhausted under the circumstances presented herein which have come to the attention of Northwest since the filing of its main brief are Morris v. United States Department of Labor, 439 F. Supp. 1014 (S.D. Ill. 1977), and Minnesota v. Federal Cartridge Corp., 6 BNA OSHA 1287 (D. Minn. 1977).

Moreover, because it is the FAA which is authorized by Congress to regulate, and does regulate, the safe working conditions of Northwest's ground maintenance employees, the Secretary's lengthy argument that Section 8(a) of the Act evidences Congress' intent to authorize warrantless searches* by OSHA officials (see pp 8-11, and Point II, pp. 18A-22, of the Secretary's brief) is irrelevant, for a search of Northwest's premises may not be conducted by OSHA with or without a warrant.

* While the Secretary emphasizes that "prompt, unannounced inspections are an important element in enforcement" of the Act (Secretary's brief, p. 22), the need for such an inspection of Northwest's premises does not exist. Apart from the FAA's regulation of the working conditions of Northwest's employees, the Secretary has not suggested that there are any working conditions within Hangar No. 1 which pose an immediate threat to Northwest's employees, whether or not the FAA regulates those conditions. In addition, the Secretary sought to inspect Hangar No. 1 on October 27, 1976, approximately 19 months subsequent to his inspections of that hangar on February 18, 1975. On November 4, 1976 he obtained an ex parte warrant to examine those premises, and on November 5, 1976 that warrant was vacated. It was not until December 1, 1976 that the Secretary moved before the District Court for reinstatement of the warrant, and he subsequently did not oppose Northwest's application for a stay of the order appealed from herein directing the reinstatement of the warrant. As a result, in connection with this action approximately 16 months have elapsed since the Secretary sought to inspect Hangar No. 1. In this case, the Secretary's actions belie the alleged need for unannounced inspections.

CONCLUSION

The orders of the District Court dated June 10, 1977 and July 5, 1977 should be reversed, with directions to the District Court to dismiss the complaint.

Dated: New York, New York
February 24, 1978

Respectfully submitted,

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No. 24-4616600
Qualified in Kings County
Commission Expires March 30, 1978

United States Court of Appeals

For the Second Circuit

Docket No. 77-6103

W. J. USERY, JR., Secretary of Labor, U.S. Dept. of Labor,
Plaintiff-Appellee.

v.

NORTHWEST ORIENT AIRLINES, INC.,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

STATE OF NEW YORK }
CITY OF NEW YORK } ss.:
COUNTY OF NEW YORK }

CLARENCE GRANT, being duly sworn, deposes and

says, that he is over 18 years of age. That on the 1st. day of
December, 1977, he served 2 Copies of

the attached ~~to~~ within joint appendix and appellant brief on

the attorney for the Plaintiff- Appellee

herein by depositing the same, properly enclosed in a securely sealed

post-paid wrapper, in a U. S. Post Office at 90 Church Street, New

York City, directed to said attorney at U.S. Department of
Labor, room S 4004, Washington, D.C. 20210
Attn: Nancy L. Southard, Esq.

this being the place where they maintain offices for the

regular transaction of business, and the last address mentioned in

the papers last served by them

Sworn to before me this

1st. day of December, 1977.

Monroe D. Rosen

Ray Marshall, Secretary of Labor,
U.S. Dept. of Labor,

Plaintiff-Appellee,

v.

Northwest Orient Airlines, Inc.,

Defendant-Appellant.

Docket No. 77-6103

STATE OF NEW YORK
CITY OF NEW YORK } ss.:
COUNTY OF NEW YORK }

THOMAS MITCHELL

THOMAS MITCHELL, being duly sworn, deposes and

says, that he is over 18 years of age. That on the 27th day of

February, 1978, he served 2 copies of

the attached Reply Brief on

the attorney for the Plaintiff-Appellee

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Room S 4004, Washington, D. C. 20210

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Monroe D. Rosen

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